

[Cite as *State v. Herring*, 2015-Ohio-1281.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 12 JE 32
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
NATHAN Da'SHAWN "BOO" HERRING,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 99 CR 115.

JUDGMENT: Affirmed in Part; Two Firearm Specifications Vacated; and Remanded for Limited Post-Release Control Resentencing.

APPEARANCES:  
For Plaintiff-Appellee: Attorney Jane Hanlin  
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For Defendant-Appellant: Attorney Lynn Maro  
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: March 30, 2015

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DeGENARO, J.

{¶1} Defendant-Appellant, Nathan "Boo" Herring appeals from the November 16, 2012 judgment of the Jefferson County Court of Common Pleas arising from his pro-se request for a resentencing hearing. On appeal Herring argues that the trial court erred in failing to vacate the firearm specifications appended to the previously vacated murder counts and that he was entitled to a de novo sentencing hearing rather than one limited to post-release control issues. Herring's arguments are meritorious in part.

{¶2} Although the trial court properly vacated the underlying murder convictions, the firearm specifications attached to those offenses should have been vacated as well. Further, Herring is entitled to a limited re-sentencing hearing regarding post-release control notification, not a de novo resentencing. Finally, Herring's merger argument is barred by the doctrine of res judicata, and his constitutional arguments are waived because they were not first raised in the trial court. Accordingly, the judgment of the trial court is affirmed in part, the two firearm specifications, attendant to the aggravated murder convictions previously vacated by the trial court, are vacated; and the matter is remanded to the trial court to conduct a limited resentencing hearing on the issue of post-release control.

### **Facts and Procedural History**

{¶3} In Herring's direct appeal, *State v. Herring*, 7th Dist. No. 00 JE 37, 2002-Ohio-2786, this Court set forth the facts follows:

In the early morning hours of May 31, 1999, Terrell Yarbrough (codefendant in this case) and Herring broke into the home of Aaron Land, Brian Muha and Andrew Doran located at 165 McDowell Avenue, Steubenville, Ohio. Yarbrough and Herring beat and kidnapped Land and Muha. Andrew Doran escaped from the house and called the police.

Yarbrough and Herring forced Land and Muha into Muha's Chevy Blazer. Yarbrough and Herring proceeded to drive the victims through Ohio, West Virginia and into Pennsylvania. In Pennsylvania, Yarbrough and Herring forced the victims up a hillside along U.S. 22. On that hillside, both victims were shot in the head at close range.

Yarbrough and Herring immediately proceeded to drive to Pittsburgh, Pennsylvania, where Herring was caught on a bank video trying to use Muha's ATM card. While in Pittsburgh, Herring and Yarbrough robbed Barbara Vey at gunpoint of her BMW. These events occurred within hours of the murders of Land and Muha.

Yarbrough drove the stolen Blazer back to Steubenville, while Herring drove the stolen BMW back to Steubenville. Yarbrough and Herring were later apprehended. Fingerprints and blood of Herring were found in both the BMW and in the Blazer.

Herring was indicted in a twenty count indictment. The indictment included two counts of aggravated robbery, each with a firearm specification; one count of aggravated burglary, with a firearm specification; two counts of kidnapping, each with a firearm specification; one count of gross sexual imposition; six counts of aggravated murder for the murder of Land, each with firearm specifications and aggravating circumstances specifications (capital offense); six counts of aggravated murder for the murder of Muha, each with firearm specifications and aggravating circumstances specifications (capital offense); one count of receiving stolen property; and one count of grand theft. Herring's case went to trial. The jury found him guilty on all charges except for the gross sexual imposition charge. During the sentencing phase, the jury returned a recommendation of life imprisonment without parole for each of the two murders.

The trial court sentenced Herring to a total of twelve years for the firearm specifications. He received three years on each of the firearm specifications in the two kidnapping counts; three years on the firearm specifications for the aggravated murder of Land; and three years on the firearm specifications for the aggravated murder of Muha. The trial court sentenced Herring to a total of fifty-three years for two counts of

aggravated robbery, two counts of kidnapping, one count of aggravated burglary, one count of receiving stolen property, and one count of grand theft. The trial court followed the jury's recommendation and sentenced Herring to two life terms in prison without the possibility of parole for the murders of Land and Muha. The trial court held that consecutive sentences were necessary to fulfill the purposes of R.C. 2929.11. Therefore, Herring was sentenced to serve the twelve years for the firearm specifications first, followed by the fifty-three year sentence for the other charges followed by the first life sentence, followed by the second life sentence.

*Herring I* at ¶2–7.

{¶4} Because Herring's co-defendant Yarbrough received a death sentence, his appeal was directly heard by the Ohio Supreme Court, which held that Ohio lacked jurisdiction to convict Yarbrough of aggravated murder because the two murders occurred in Pennsylvania, despite the fact that the felony portion of the offenses were committed in Ohio. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶1.

{¶5} Following that decision, Herring filed a petition for post-conviction relief pursuant to R.C. 2953.21. Herring admitted that the petition was filed outside of the 180 day limit set forth in R.C. 2953.21, however, he asserted that he met the requirements in R.C. 2953.23(A)(1) which allow for petitions to be filed late.

{¶6} Explaining that Herring's petition met the statutory delayed petition requirements in part because subject matter jurisdiction can be collaterally attacked at any time, the trial court held that the murder convictions and sentences must be vacated on the basis of *Yarbrough*. Regarding the remaining convictions, the trial court found the requirements permitting untimely filing were not met. On appeal, Herring challenged the trial court's determination that the motion was untimely and failed on the merits; this court affirmed, rejecting Herring's argument that the non-homicide

convictions should be reversed and a new trial ordered. *State v. Herring*, 7th Dist. No. 06 JE 8, 2007-Ohio-3174 (*Herring II*).

{¶7} On October 16, 2012, Herring filed a pro-se "Motion for Sentencing" with the trial court, requesting that he be sentenced "pursuant to the mandatory provisions" of certain enumerated cases. The trial court appointed counsel for Herring and set the matter "to determine the scope of the resentencing." At a subsequent proceeding, the trial court stated "I guess there's an agreement that the Defendant is entitled to a new sentencing hearing. There's some question about the scope of the hearing, whether it is simply to address post-release control or it's a de novo hearing starting from the beginning." The parties agreed and the matter was continued for counsel to further research the issue of the scope of the upcoming sentencing hearing.

{¶8} On November 13, 2012, the merits of the motion were heard, and the trial court began the hearing by stating "we're here to impose the PRC I think." Herring's attorney and the State proceeded to debate whether Herring was entitled to a de novo hearing. For the first time Herring's attorney, citing *Yarbrough*, argued that Herring's charges of theft and receiving stolen property should have been merged. The State disagreed arguing that Herring was entitled to a limited resentencing hearing solely on the issue of post release control and that the issue of merger was not properly before the court. The trial court's November 16, 2012 "Order Imposing Post-Release Control & Overruling All Other Pending Motions" found regarding post-release control:

"Pursuant to *Fisher* [sic] this Court explained to Defendant who was represented and in open Court that he is subject to Mandatory Post Release Control for a period of five (5) years beginning upon his release from prison all of which is mandatory pursuant to Ohio Revised Code Section 2967.28(B)"

### **Allied Offenses**

{¶9} Although not specifically assigned as error, Herring challenges the consecutive sentences imposed for his convictions of Receiving Stolen Property and Grand Theft, contending they are allied offenses and should have been merged. Although Herring did not raise this issue in his direct appeal, Yarbrough, who was also convicted and sentenced for these offenses, did. In Yarbrough's direct appeal the Ohio Supreme Court merged Yarbrough's conviction for receiving stolen property into his conviction for grand theft. Herring also failed to raise the issue in *Herring II* as well as in his pro-se motion filed with the trial court which gave rise to this appeal.

{¶10} The first time any argument regarding allied offenses was made was at the November 13, 2012 hearing. Court appointed counsel for Herring stated:

"However, on further reading of *Yarbrough* there was a decision by the Supreme Court that states that the charges of theft and receiving stolen property could not be sentenced independently and consecutively to one another."

{¶11} The State countered:

"So, the issue that he brings up as it relates to the *Yarbrough* case that the Court never merged the theft and receiving stolen property cases isn't even raised in this motion. This motion is limited to saying he doesn't think post-release control was imposed correctly and I don't think it was that the Court missed it. In the initial time it wasn't applicable because I think in part he had been sentenced by this Court to life in prison without the possibility of parole."

{¶12} As demonstrated in its judgment entry, the trial court did not reach the merits of Herring's merger argument and limited argument to post release control:

"At hearing, Defendant's Counsel and Defendant made statements that

could be construed as other Motions on other grounds, none of which were the subject of the Motion filed by Defendant on October 6 (sic), 2012. To the extent that any of those comments or statements constitute Motions they are overruled."

{¶13} This court recently held:

We have held that "errors in merging charges are not jurisdictional and do not result in void convictions or sentences." *State v. Gessner*, 7th Dist. No. 12 MA 182, 2013-Ohio-3999, ¶ 23. That said, failure to properly merge allied offenses could result in a sentence that is potentially voidable rather than void ab initio, but voidable errors must be raised on direct appeal or else they are waived. *Id.* at ¶ 23–24; see also, *State v. Norris*, 7th Dist. No. 11 MO 4, 2013-Ohio-866. Allied offense claims are barred by the doctrine of res judicata where they could have been raised on direct appeal and were not. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, 894 N.E.2d 44, ¶ 10-11; see also, *Billiter v. Banks*, 7th Dist. No. 12 NO 397<sup>1</sup>, 2012-Ohio4556, ¶ 6-7. A defendant has an adequate remedy for any errors relating to allied offenses by way of direct appeal. *Id.*

*State v. Simmons*, 7th Dist. No. 13 JE 15, 2014-Ohio-1014, ¶9.

{¶14} The Eighth District considered a similar case holding:

"In the present case, appellant did not bring a direct appeal from his original 1999 sentencing challenging the issue of merger of allied offenses. Nor did appellant seek a delayed appeal on this matter. Only nine years later, after his 2008 resentencing conducted solely for advisement of post-release control, did appellant for the first time bring an

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<sup>1</sup> The correct citation is 7th Dist. No. 12 NO 394, 2012-Ohio-4556, ¶ 6-7.

appeal on the issue of merger. Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in that judgment of conviction or on an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104. *Fischer* makes it clear that only the offending portion of a sentence is void due to a failure to properly impose post-release control is subject to review and correction on a resentencing appeal. We recently held in *State v. Poole*, Cuyahoga App. No. 94759, 2011–Ohio–716 that, "the time to challenge a conviction based on allied offenses is through a direct appeal—not at a resentencing hearing." In the present instance, the proper avenue for appellant's merger challenge would have been a direct appeal from his 1999 sentencing."

*State v. Padgett*, 8th Dist. No. 95065, 2011-Ohio-1927, ¶8.

{¶15} The record demonstrates that Herring did not raise the issue of allied offenses in his direct appeal, in *Herring II* or in his motion herein. Relying on *Yarbrough* does not protect him from the effect of res judicata merely because the case involved a co-defendant; that decision carries no more precedential effect than case law which existed at the time of Herring's direct appeal and could have been used to support his merger argument at the time. Accordingly, the doctrine of res judicata precludes us from considering the merits of Herring's argument that his convictions for grand theft and receiving stolen property are allied offenses subject to merger.

#### **Vacation of Firearm Specifications**

{¶16} Herring's first of four assignments of error asserts:

"The trial court erred is (sic) failing to vacate the sentence for a firearm specification when there was no subject matter jurisdiction for the underlying offense in violation of due process and cruel and unusual



punishment of the Eighth and Fourteenth amendment of the United State (sic) Constitution and Ohio Constitution, Article I, Sections 9 and 16."

{¶17} In 2006 after the *Yarbrough* decision, Herring filed a petition for post-conviction relief, which resulted in the trial court vacating the aggravated murder convictions and sentences on the basis of *Yarbrough*. In this appeal, Herring contends that the trial court failed to vacate the appended firearm specifications.

{¶18} R.C. 2941.145 addresses firearm specifications and states that an "imposition of a three-year mandatory prison term upon an offender \* \* \* is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control *while committing the offense* and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to *facilitate the offense*." (emphasis added). Here, the aggravated murder conviction is a necessary element of the firearm specification. Consequently, when the trial court vacated the aggravated murder counts, the attached specifications should have been vacated as well.

{¶19} When Herring was originally sentenced the trial court imposed consecutive sentences as follows: two life terms in prison without the possibility of parole for the murders of Land and Muha; 53 years for two counts of aggravated robbery, two counts of kidnapping, one count of aggravated burglary, one count of receiving stolen property, and one count of grand theft; and 12 years for the firearm specifications. Thus, Herring had to serve 65 years followed by successive life sentences.

{¶20} The confusion regarding this issue arises from the November 13, 2012 hearing when post-release control was addressed. The trial court informed Herring as part of the post-release control notification that he could be subject to up to one half of his originally imposed sentence of 65 years. However, after the trial court vacated the aggravated murder charges, the six years on the firearm specifications appended to those charges should also have been vacated, thus reducing Herring's total sentence to

59 years. Accordingly, Herring's first assignment of error is meritorious and the two gun specifications, attendant to the two aggravated murder convictions the trial court had vacated in 2006, are vacated.

### **Post-Release Control Notification Resentencing**

**{¶21}** Herring's second of four assignments of error asserts:

"The trial court erred is (sic) failing to conduct a de novo sentencing hearing to correct defective sentences in violation of the Fourteenth amendment of the United State (sic) Constitution and Ohio Constitution, Article I, Section 16."

**{¶22}** In addition to the erroneous post-release control notification at the 2012 hearing as discussed above, Herring did not receive notification at his sentencing hearing in 2000, in 2006, or in either judgment entry resulting from those hearings. When a person is being sentenced for a felony conviction, the trial court must give notice of post-release control at the sentencing hearing and in the final judgment entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶17. This must be done regardless of whether the term of post-release control is mandatory or discretionary. *State v. Ryan*, 172 Ohio App.3d 281, 2007-Ohio-3092, 874 N.E.2d 853, ¶9. "A trial court must provide statutorily compliant notification to a defendant regarding post-release control at the time of sentencing, including notifying the defendant of the details of the post-release control and the consequences of violating post-release control." *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶18.

**{¶23}** "A sentence that does not include the statutorily mandated term of post-release control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus. However, the Court elaborated further:

The new sentencing hearing to which an offender is entitled under *State v.*

*Bezak* is limited to proper imposition of postrelease control. (*State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus, modified.) Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.

*Fischer*, paragraph 2 and 3 of the syllabus.

{¶24} Regardless of the clarity of *Fischer's* syllabus law, Herring nonetheless contends that he is entitled to a de novo resentencing pursuant to the Court's subsequent decision in *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960 (2012). The Second District recently rejected this argument, quoting the trial court's analysis:

*Billiter*, however, is distinguishable from the case at bar. At issue in *Billiter* was whether the defendant's sentence for post-release control was void, and thus his charge of escape was based on that void sentence. In the case at bar, Defendant argues that the failure of the Court to properly sentence him to post-release control renders his *entire* conviction for gross sexual imposition to be void. Unlike *Billiter*, Defendant is not charged with escape for violating his post-release control. Rather, Defendant's charged offense of failure to notify is not based on his underlying sentence. It is based on his prior conviction for gross sexual imposition. While *Billiter* does allow defendants to collaterally attack a sentence that was issued in error, it does not permit a collateral attack on other lawful aspects of the conviction. The Court finds that the ruling in *State v. Fischer*, 128 Ohio St.3d 92, 2010 Ohio 6238 still applies to the facts of this case. In *Fischer*, the Ohio Supreme Court held "Although the doctrine of res judicata does not preclude review of a void sentence, res

judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *Fischer*, supra, at paragraph three of the syllabus. *Billiter* expanded upon *Fischer* to the point of permitting collateral attacks on a void sentence. *Billiter*, however, did not overrule *Fischer's* holding that res judicata is a bar to relitigating other, lawful portions of a conviction. Dkt. 39, p. 2.

As the trial court explained, the facts in *Billiter* are significantly different from the facts in the case before us. In *Billiter*, the Court was faced with a post-release control portion of a sentence that was void and a subsequent conviction for escape that was based on a violation of the void post-release control portion of the previous sentence. Under those facts and the precedence in *Fischer*, *Billiter* was able to attack his escape conviction as flowing from a void sentence. But Young cannot make the same contention in this case, because his Failure to Notify conviction was not related to the post-release control portion of his sentence. Young's Failure to Notify conviction was based on duties imposed on him by the portion of the 2001 judgment of conviction and sentence that Young has not challenged as void. Consequently, Young is precluded by *res judicata* from now attempting to collaterally attack those valid portions of his conviction and sentence for Gross Sexual Imposition, which are not void. *Fischer*.

*State v. Young*, 2nd Dist. Case No. 25776, 2014-Ohio-2088, ¶10-11.

{¶25} Pursuant to *Fischer*, *Billiter* and *Young*, the trial court was correct in limiting the resentencing to notifying Herring about post-release control. However, as discussed above, the trial court incorrectly stated the length of Herring's prison term. Further, the trial court did not include any information regarding the consequences of violating post-release control in the sentencing entry. Accordingly, this matter is

remanded for a limited resentencing hearing and judgment entry for the proper imposition of post-release control, based upon an aggregate consecutive sentence of 59 years.

**{¶26}** Herring's third and fourth assignments of error, which will be addressed together for clarity of analysis, respectively assert:

"The Trial Court Erred in Resentencing Appellant Pursuant to the Procedures in R.C. §2929.191 as R.C. §2929.191 Is an Unconstitutional Violation of the Separation of Powers and Section 5(b), Article IV of the Ohio Constitution."

"The Trial Court Erred in Sentencing Appellant under R.C. §2929.191, in Violation of the *Ex Post Facto* Provisions of the Ohio and United States Constitutions"

**{¶27}** The failure to challenge the constitutionality of a statute at the trial level constitutes a waiver of the issue on appeal. *State v. Caplan*, 7th Dist. 03 MA 91, 2004-Ohio-4990, ¶9, citing *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. This is because the trial court should have the first opportunity to address constitutional issues. *Awan* at 122.

**{¶28}** Neither in Herring's pro-se 'Motion for Sentencing' filed with the trial court, nor during appointed counsel's arguments during the hearing, were any constitutional arguments raised. As the arguments regarding separation of powers and ex post facto are being raised for the first time on appeal, thereby depriving the trial court of the opportunity to consider the issues, consistent with *Awan* and *Caplan*, these arguments are waived. Moreover, *Fischer* makes it clear that only the offending portion of a sentence is void due to a failure to properly impose post-release control. Accordingly, Herring's third and fourth assignments are waived.

**{¶29}** In sum, although the trial court properly vacated the underlying murder convictions, the firearm specifications attached to those offenses should have been

vacated as well. Further, Herring is entitled to a limited re-sentencing hearing regarding post-release control notification, not a de novo resentencing. Finally, Herring's merger argument is barred by the doctrine of res judicata, and his constitutional arguments are waived because they weren't first raised in the trial court. Accordingly, the judgment of the trial court is affirmed in part, the two firearm specifications attendant to the aggravated murder convictions previously vacated by the trial court, are vacated and the matter is remanded to the trial court to conduct a limited resentencing hearing on the issue of post-release control.

Donofrio, P.J., concurs.

Waite, J., concurs.